Jet Star, Inc. *and* John Krueger. Case 13–CA–35087

May 27, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND BRAME

On September 16, 1998, Administrative Law Judge Robert A. Giannasi issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Jet Star, Inc., Hammond, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

"(a) Within 14 days from the date of this Order, offer John Krueger full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent job, without prejudice to his seniority or any other rights or privileges previously enjoyed.''

2. Insert the following as paragraph 2(b) and reletter the subsequent paragraphs.

"(b) Make John Krueger whole for any loss of earnings or benefits he may have suffered due to Respondent's discrimination, in the manner set forth in the remedy section of the judge's decision.''

3. Substitute the following for relettered paragraph 2(c).

"(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of John Krueger, and within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.''

4. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to mail and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice.
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against employees in order to discourage union activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer John Krueger full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent job, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make John Krueger whole for any loss of earnings and benefits suffered as a result of our unlawful discrimination, with interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to his unlawful discharge, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

JET STAR, INC.

Denise Jackson, Esq., for the General Counsel.
Steve Shoup, Esq., of Indianapolis, Indiana, for the Respondent.

DECISION

STATEMENT OF THE CASE

ROBERT A. GIANNASI, Administrative Law Judge. This case was tried in Chicago, Illinois, on June 29 and 30, 1998. Parts

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In affirming the judge's finding that the Respondent discharged employee John Krueger in violation of Sec. 8(a)(3) and (1) of the Act, we do not rely on the judge's finding that the Respondent "intercepted'' a fax of union bylaws that was addressed to prounion employee John Ramos from former dispatcher and Supervisor Amy Gregory. Instead, we rely on, inter alia, the uncontradicted evidence that 2 weeks after the bylaws were faxed, Terminal Manager Smith approached Gregory with a copy of the bylaws and asked if she knew anything about them.

Further, Member Brame finds it unnecessary to pass on the judge's finding that "[i]t is uncontradicted" that Krueger's alleged improper shifting of truck 296 on March 10, 1997, did not result in any damage to this vehicle "on March 10 or at any time.'' Member Brame notes that any damage Krueger's shifting may have caused to the truck would not occur immediately but, rather, over a period of time as he drove the vehicle. Nonetheless, Member Brame agrees with his colleagues that the Respondent has not rebutted the General Counsel's prima facie case of unlawful conduct in this instance.

[2] We shall modify the judge's recommended Order to conform to our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

of the original consolidated complaint, which involved another employer, were settled. The instant complaint remained, alleging that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging employee John Krueger for engaging in union activities. The Respondent denied the essential allegations in the complaint. The General Counsel presented an oral argument at the conclusion of the trial and the Respondent filed a posthearing brief, both of which I have considered in preparing this decision.

Based on the entire record, including the testimony of the witnesses and my observation of their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, an Indiana corporation with an office and place of business located in Hammond, Indiana (the Hammond terminal) is engaged in the business of transportation of petroleum products. During a representative 1-year period, Respondent derived revenues in excess of $50,000 for the transportation of freight from Indiana to points outside Indiana. Accordingly, I find, as the Respondent concedes, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Local 705 and Local 142 of the International Brotherhood of Teamsters, the two unions involved (the Union) are labor organizations within the meaning of Section 2(5) of the Act.

II. THE UNFAIR LABOR PRACTICE

A. Background

The Respondent operates a fleet of trucks that deliver jet fuel to airports from 17 terminals nationwide. It employs 180 drivers, 40 of whom drive some 18 trucks out of the Hammond terminal. At least in Hammond, the drivers are not assigned to a particular truck, which may be driven by many different drivers.

The Respondent's founder and chief executive officer is Darryl Guiducci, whose office is located at the Respondent's headquarters in Zionsville, Indiana. At all relevant times, Mark Smith was the Hammond terminal manager, Ed Bell was Respondent's director of operations and Smith's immediate supervisor, and Robert Mulligan was Respondent's maintenance coordinator. Both Bell and Mulligan are stationed in Zionsville.

B. The Facts

Before he was discharged on March 11, 1997, allegedly for having pulled out of the Hammond terminal in high gear at the start of his shift the day before, employee John Krueger had worked for the Respondent as a truckdriver since July 1995. He worked on the night shift, from 3 p.m. to 3 a.m. Krueger had 10 to 12 years of truck driving experience before joining the Respondent and was an automobile mechanic for 20 years before that. Prior to his discharge, Krueger had a virtually unblemished record. He had no written warnings, suspensions, or discipline in his file, although he had two minor verbal warnings, one in November 1995 and one in March 1996, neither of which played any part in the discharge decision. He had received regular safety and bonus awards and was involved in no accidents or driving infractions, so far as the record shows.

There is evidence that Guiducci visited the Hammond terminal in early November 1996 and rode with nine drivers, including Krueger, after which he completed so-called safety performance observation forms for each driver. Krueger's form, which was dated November 6, 1996, included a caution not to start his truck in high gear. The form also noted positive comments about Krueger's driving, as well as comments from Krueger in the nature of suggested improvements by the Respondent, including "more pay." As Guiducci conceded, this caution was not a warning; he merely suggested that Krueger be given a videotape about shifting properly, which Krueger was asked to view at home on his vcr. Where appropriate, the Respondent does issue verbal warnings, which are memorialized on written forms, as well as written counseling reports, also on written forms, and formal written warnings. The record contains no further evidence of warnings or cautions about any type of shifting problems on Kreuger's part from early November 1996 until Kreuger's discharge in March 1997.

Krueger was instrumental in contacting Local 142 and bringing it to the point of vying for support in a Board-conducted election, which the Union lost in June 1996 by a vote of 19 to 14. He was quite active in the union campaign, soliciting employees to sign authorization cards, attending union meetings, and wearing union buttons to work. The Respondent fought vigorously against union representation, sending letters to employees' home and conducting mandatory employee meetings on company time addressed by top management officials, including Guiducci. Krueger spoke up at some of these meetings, emphasizing the need for wage increases, one of the prime issues in the union campaign. Krueger also served as the Union's election observer at both of the voting sessions.

Beginning in January 1997, the Respondent's Hammond employees renewed their interest in forming a union. Several drivers approached Krueger, and he spoke to about 10 to 15 employees about the matter. Some employees contacted the Independent Truck Drivers Union, but they eventually decided against pursuing representation through that union. Later, in late January or early February 1997, Krueger and another employee contacted Teamsters Local 705. Krueger spoke to Local 705 representatives about six or seven times during this period of time.

In mid-January, Guiducci conducted another meeting of Hammond employees, the first since the Board-conducted election. At the meeting, Krueger questioned Guiducci about more pay. Krueger had regularly asked questions about pay raises in the last election campaign, and, indeed, in November 1996, Guiducci had noted that Krueger wanted "more pay." Other employees also asked about pay raises during the January 1997 meeting, and Guiducci promised to look into the matter. This meeting was apparently followed by another, in which the employees were basically told that the existing pay rates were well within area standards and no pay raise would be forthcoming.[1]

Former Dispatcher and Supervisor Amy Gregory testified that, in early February 1997, she faxed certain union bylaws to employee John Ramos, who was staying in a motel in Milwaukee, apparently with other employees or officials of the Respondent. The request to fax the documents was made by employee Wesley Gillian, who also testified in this proceeding. Both Gillian and Ramos were union supportors. The faxed

[1] The testimony about the renewed union activity and the meeting described above was uncontradicted.

documents were received at the motel, but were intercepted and never delivered to Ramos. About 2 days later, Gregory was told that Ed Bell had a copy of them, and, about 2 weeks later, Terminal Manager Smith approached her with a copy of the bylaws and asked if she knew anything about them. She testified that, until then, she had not known that he documents she faxed were union bylaws. She told Smith that she did not know anything about the documents, but she had overheard drivers talking about a "union vote." Smith then told Gregory that they needed to "start pushing the issue of writing drivers up" because they were "getting the Union vote." He mentioned three names, including Kreuger and Gillian. Smith did not testify so Gregory's testimony about her conversation with Smith is uncontradicted.

Gregory also testified about overhearing an exchange between Smith and Ed Bell, whose voice she recognized as being on the other end of a speaker phone conversation. This exchange took place some time in February. Ed Bell told Smith that if "there was going to be a union vote" Guiducci "would close the doors of the Hammond terminal." They also discussed discharging prounion employees and finding a reason for doing so. Neither Smith nor Bell testified so this testimony is likewise uncontradicted.[2]

I credit Gregory's testimony as set forth above, not only because it was uncontradicted, but because she impressed me as a candid and reliable witness. Her account about management's interception of the faxed union bylaws is generally supported by employee Gillian. Her account of Bell and Smith talking about retaliating against Krueger and other union supporters sounds plausible. Because she was a fellow supervisor, Smith would likely talk to her openly and be unconcerned that she overheard the conversation between him and Bell. Her account in this respect also finds support in the circumstances of Krueger's discharge and its pretextual nature, which I discuss more fully later in this decision.

In its brief, the Respondent nonetheless asks me to discredit Gregory because she had a "personal relationship" with union supporter John Ramos, and because she allegedly "lied" about whether she "knowingly" faxed the bylaws to Ramos and to Terminal Manager Smith when the latter confronted her with the bylaws. I do not find the Respondent's contention in this respect persuasive. I could discern no propensity on Gregory's part to testify other than in a truthful manner simply because of her personal relationship with Ramos. Krueger, not Ramos, had filed the charge in this case. Ramos did not even testify. Nor has the Respondent showed that Gregory lied when she testified she did not know the documents she was faxing for Gillian were union bylaws. The documents were 13 pages long and I find it perfectly plausible that she did not know what she was faxing until later, when Smith approached her about the documents. Gillian's testimony is not to the contrary. His testimony simply describes the documents he gave Gregory; it does not reflect what he told Gregory at the time. Far more significant is Gillian's general corroboration of Gregory that management officials intercepted the union bylaws before they got to Ramos. As to her conversation with Smith, I find that Gregory did not in fact know that the documents were bylaws. But, in any event, what she told Smith is less important that what Smith told her, particularly since Smith did not testify. As I have indicated, what Smith told her was supported by the circumstances of Krueger's discharge and its pretextual nature. In sum, the Respondent has not convincingly demonstrated that I should discredit Gregory.

On March 10, 1997, after reporting for work and performing necessary preliminary tasks at the terminal, Krueger drove truck 296 out of the terminal driveway and onto the adjoining highway. He was observed by Terminal Manager Smith and Maintenance Coordinator Mulligan. Smith did not testify, but Mulligan described Krueger's truck departure as "laboring." He opined that Krueger probably started in fourth gear rather than second gear, which would have been acceptable. Krueger testified that he started in second gear and shifted appropriately as he reached the highway.

After the incident, which took place at about 4 or 4:30 p.m., Smith called Guiducci at Zionsville and discussed the matter. Although the discharge decision, was made by Guiducci, Smith signed the discharge slip, which was also signed by Mulligan as a witness. Smith signed the slip after Mulligan signed it and Mulligan signed it after it was fully completed, save Smith's signature.

The discharge decision was thus made on March 10, the day of the incident, in the absence of any discussion with Krueger. Krueger was permitted to work the remainder of the day. He had radio contact with the Hammond terminal and delivered a second load of jet fuel from the Hammond refinery to Midway Airport that day. But no one from management spoke to him about the incident that caused his termination until the next day, March 11, when he reported for work at 3 p.m. and was presented with the discharge slip mentioned above, which accused him of "abusing" company equipment. Smith, who presented Krueger with his discharge slip, told him the discharge decision was "not his idea" and "[i]t came from Zionsville," corporate headquarters.

There is no evidence of any further investigation of the incident, even though Respondent's employee handbook provides for such investigation. It is uncontradicted that this incident did not result in any damage to truck 296 that was attributable to Krueger's alleged shifting impropriety on March 10 or at any other time.

C. Discussion and Analysis

The evidence clearly supports a finding, which I make, that a reason for the Respondent's discharge of Krueger was his renewed union activity. Krueger was, of course, a known union activist from the time of the failed election campaign in the summer of 1996. He was the Union's election observer and Respondent had vigorously opposed the Union at that time. After a period of quiescence, the employees resumed their union activity and attempted to get a union interested in organizing them beginning in January 1997. The pivotal issue in the resumed campaign, as in the original, was pay. Indeed, in January, for the first time since the election of the year before, Guiducci held an employee meeting in Hammond, in which Krueger and other employees spoke up for higher pay, the same issue that had been prominent in the last union campaign. Since Krueger was viewed as a leader in the last campaign, he

[2] Smith was no longer employed by Respondent at the time of the hearing, although there was no showing that he was unavailable to testify. Bell was, however, still employed. It appears that Respondent's failure to call Smith would not give rise to an adverse inference (see *Nobar, Inc.,* 267 NLRB 916, 918 (1983)); but, clearly, its failure to call Bell permits the inference, which I make, that his testimony, at least, would have been damaging to Respondent. *See International Automated Machines,* 285 NLRB 1122, 1123 (1987).

would naturally be viewed as a leader in the renewed campaign. Respondent's concern about such a renewed campaign is confirmed by the evidence surrounding the Respondent's interception of a fax of union bylaws. Management officials specifically mentioned Krueger as one of the targets for discharge and they also made clear that the Respondent was going to find reasons to discharge Krueger and others. Shortly after these events, Krueger was in fact discharged. The evidence of timing and of animus directly targeting Krueger, set forth above, leads compellingly to an inference of discrimination.

That inference is also supported by the circumstances of Krueger's discharge. He was fired for a one-time incident of starting a truck in high gear, contrary to the Respondent's progressive discipline system, which requires prior warnings, and without any investigation. Moreover, as shown below, the Respondent's reason for the discharge was pretextual, thus further buttressing the inference of discrimination. It is thus clear that the General Counsel has established a prima facie case of discrimination under *Wright Line*.[3]

Respondent has not rebutted the General Counsel's prima facie case of discrimination. Indeed, the failure of Respondent's reasons for the discharge to withstand scrutiny convinces me of their pretextual nature. Guiducci obviously made the decision to discharge Krueger. Although he testified that he made that decision because of Kreuger's alleged improper shifting on March 10, 1997, I reject that testimony as incredible and that reason as a pretext. Guiducci was not a credible witness on this or any other significant issue.

Initially, Smith's consultation with the chief executive officer of a nationwide corporation on this matter confirms and is compatible with Gregory's testimony that Respondent was looking for a reason to discharge Krueger. Secondly, the immediate discharge of Krueger for improper shifting or starting in a high gear was unaccompanied by any investigation or attempt to get Krueger's side of the story. The discharge was also contrary to Respondent's progressive disciplinary system, which requires warnings before discharges of this type. Guiducci's November 1996 caution to Krueger was not a disciplinary matter or formal warning, as he himself admitted. Nor was it followed by any complaints by management about his driving until the incident that prompted the discharge. Indeed, Respondent let Krueger drive the remainder of the day without recalling him or talking to him about his alleged dereliction, thus showing that it was more interested in punishing Krueger than in salvaging its truck. Guiducci's testimony shows that lengths he was willing to go to rid himself of Krueger. He testified that he had received complaints from mechanics about Krueger's driving between November of 1996 and March 1997, but that testimony was vague and generalized. No one was called to corroborate him on this point and no written documentation was offered to support the point.

The Respondent tried to show that other drivers were fired for "abuse of equipment," the charge leveled at Krueger, and that this justified an immediate discharge under its progressive disciplinary system. But Respondent's contention is unsupported by the evidence. The testimony about those incidents not only shows that the Respondent's contention is without merit, but that they were much more serious and involved accidents or damage to equipment, something that was not involved in the incident that led to Krueger's discharge. For example, one of the discharged employees whose situation was alleged to be similar to Krueger's ran into the corner of a building with his truck. Another was drinking and drove his truck into a ditch, tearing up an axle; another "tore the truck up" by running into a guard pole; another ran into a truck and a fence; and still another hit a gate at an airport. Indeed, there is evidence that other drivers whose derelictions were more serious than Krueger's single offense of alleged improper shifting were not discharged, but were given a lesser discipline. For example, driver Gillian was issued a written warning or counseling report in March 1996 for damaging a truck. Such disparate treatment not only supports my finding of pretext but also buttresses the finding of discrimination.

Finally, Guiducci's and Respondent's attempt to show that clutch damage and repairs to trucks 296 and 298 were somehow caused by Krueger falls far short and simply illustrates an exaggerated, unsupported effort to pin something on Krueger. As befits someone who impressed me as a careful and truthful witness, as well as a careful and diligent driver, Krueger kept meticulous records and logs of his driving. His records—a summary of which was introduced in evidence after Respondent had the opportunity to check them—demonstrate that he did not drive trucks 296 and 298, the ones Respondent implied Krueger abused, very much at all. Since January 1997, he drove truck 296 five times and truck 298 three times. In the 10 months before his discharge, he was responsible for putting on less than 15 percent of the total mileage attributed to truck 296, the one he drove on March 10. Guiducci himself acknowledged that there was no way to attribute any clutch or other problems on those trucks to Krueger or any other driver. In these circumstances, I find that the Respondent discharged Krueger because of his union activities, in violation of Section 8(a)(3) and (1) of the Act.

CONCLUSION OF LAW

By discriminatorily discharging employee John Krueger because of his protected union activities, Respondent has violated Section 8(a)(3) and (1) of the Act, and that violation is an unfair labor practice within the meaning of the Act.

THE REMEDY

In addition to the usual cease-and-desist order and other affirmative action, I will recommend that the Respondent offer full and immediate reinstatement to employee John Krueger to his former job or, if that job no longer exists, to a substantially equivalent position, and make him whole for any loss of earnings or benefits resulting from the discrimination against him. The backpay is to be computed in accordance with *F. W. Woolworth, Co.*, 90 NLRB 289 (1950), with interest computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[4]

[3] *Wright Line*, 250 NLRB 1083 (1980), enfd. 662 f.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 482 U.S. 393 (1983). It is well settled that, if, as here, a respondent's reason for its actions is pretextual, that finding supports the General Counsel's initial showing of discrimination and defeats any attempt by a respondent to show that it would have acted the same way absent discrimination. See *Greyhound Lines, Inc.*, 319 NLRB 554, 575 (1995).

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the

ORDER

The Respondent, its officers, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees in order to discourage union activity.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days of this order, offer John Krueger immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent job, without prejudice to his seniority and any other rights and privileges, and make him whole for any loss or earnings he may have suffered due to Respondent's discrimination, in the manner set forth in the remedy section of this decision.

(b) Expunge from its files any reference to the discharge of John Krueger, and notify him, in writing, that this has been done and that evidence of this unlawful action will not be used as the basis for future personnel actions against him.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this order.

(d) Within 14 days after service by the Region, post at its Hammond, Indiana facility copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 11, 1997.

(e) Within 21 days after service by the Regional Director, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

Board and all objections to them shall be deemed waived for all purposes.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."